Abernathy Excavating, Inc. *and* International Union of Operating Engineers, Local No. 77, AFL–CIO. Case 5–CA–23192

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Upon a charge filed by the Union on December 9, 1992, the General Counsel of the National Labor Relations Board issued a complaint on January 22, 1993, against Abernathy Excavating Co., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. On February 5, 1993, the Respondent filed its answer admitting in part and denying in part the allegations of the complaint.

On August 18, 1993, the General Counsel filed a motion to transfer proceeding to the Board and for summary judgment. On August 23, 1993, the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent failed to file a response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

The complaint alleges, inter alia, that during the term of the collective-bargaining agreement between the Respondent and the Union, the Respondent failed to continue in effect the terms and conditions of the collective-bargaining agreement by discontinuing its contributions to the health and welfare fund; changing health insurance carriers; changing the unit employees' payday from Thursday to Friday; ceasing the 24-hour workweek guarantee; ceasing the use of the Union's hiring hall; freezing payments for accrued vacation pay; and discontinuing the provision of vacation benefits without reaching agreement with the Union.

In its answer, the Respondent does not specifically deny certain allegations, admits certain other allegations, and alleges certain justifications for its actions. The Respondent does not deny that since about May 1988 it has recognized the Union as the exclusive collective-bargaining representative of the unit employees by entering into a series of collective-bargaining agreements, the most recent effective by its terms for the period May 1, 1988, to April 30, 1991; that since on or about August 16, 1991, the Union has been certified as the exclusive collective-bargaining representative of the unit employees; and that on February 25, 1992, the Respondent executed an addendum to its collective-bargaining agreement with the Union, which extended that agreement from February 24, 1992, through August 31, 1993. The Respondent admits that it discontinued contributions to the health and welfare fund, changed insurance carriers, changed the payday from Thursday to Friday, discontinued all work guarantees, failed to pay accrued vacations, and failed to pay vacation benefits. With respect to the hiring hall allegation, the Respondent acknowledges that ''[i]n one instance we mistakenly hired an operator we were lead [sic] to believe was furnished through the Hall. As soon as we discover [sic] this was not true, he was immediately 'let go.''' The Respondent does not deny that the matters at issue relate to wages, hours, and conditions of employment of the unit employees and are mandatory subjects for the purposes of collective bargaining. Further, the Respondent does not deny that the changes in these matters commenced on or about June 9, 1992. The Respondent asserts, however, that it failed to continue the contractual provisions in effect because it is ''approaching *bankruptcy* [emphasis in original],'' its funds were insufficient, and the ''terrible recession that the construction industry is in has strained our relationship.''

The contractual provisions at issue are mandatory subjects of bargaining. A unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5). *Rapid Fur Dressing*, 278 NLRB 905 (1986). The Respondent's only defense is that its financial condition justified its actions. It is well established, however, that economic inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) by failing to abide by the provisions of a collective-bargaining agreement. *Crest Litho*, 308 NLRB 108 (1992). Further, although the Respondent alleged in its answer that it was ''approaching bankruptcy,'' the Respondent has failed to establish that it filed a bankruptcy petition. *Big Track Coal Co.*, 300 NLRB 951, 952 (1990). Accordingly, we find that the Respondent has failed to present a meritorious defense to its unlawful conduct, and grant the General Counsel's Motion for Summary Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Bladensburg, Maryland, has been engaged in the business of providing grading and hauling of earth and other material. Annually, the Respondent, in the course and conduct of its business oper-

[1] In his Motion for Summary Judgment, the General Counsel noted that the collective-bargaining agreement did not contain a provision specifying the day on which the employees should be paid. Because the Respondent admits that it changed the payday from Thursday to Friday and does not deny that such a change is a mandatory subject of bargaining and that it made the change without notice to and bargaining with the Union, we find that the Respondent's unilateral change of payday violated Sec. 8(a)(5) and (1) of the Act. *American Ambulance*, 255 NLRB 417, 421 (1981).

ations, has provided services valued in excess of $50,000 in locations other than the State of Maryland. During the same period, the Respondent, in the course and conduct of its business operations, has purchased and received products valued in excess of $5000 directly from points outside of the State of Maryland. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All operating engineers, mechanics and welders employed by the Respondent from its Bladensburg, Maryland facility; but excluding all other employees, shop laborers and clericals, office clericals, truck drivers, and guards and supervisors as defined in the Act.

From approximately May 1988 until April 30, 1991, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of unit employees by entering into successive collective-bargaining agreements with the Union, with the most recent agreement effective by its terms for the period of May 1, 1988, to April 30, 1991, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. On or about August 16, 1991, the Union was certified as the exclusive bargaining representative of the unit employees. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees.

On February 25, 1992, the Respondent and the Union executed an ''Addendum'' to the collective-bargaining agreement, which extended that agreement from February 24 through August 31, 1992. Since on or about June 9, 1992, the Respondent has failed to continue in effect all the terms and conditions of the collective-bargaining agreements by discontinuing its contributions to the health and welfare fund; changing health insurance carriers; ceasing the 24-hour workweek guarantee; ceasing the use of the Union's hiring hall; freezing payments for accrued vacation pay; and discontinuing the provision of vacation benefits. Similarly, the Respondent changed the unit employees' payday from Thursday to Friday without notice to or bargaining with the Union. These unilateral changes relate to wages, hours, and conditions of employment of the unit employees and are mandatory subjects for the purposes of collective bargaining. Further, the Respondent engaged in this conduct without agreement with the Union.

We find that, by the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSION OF LAW

By failing to continue in effect all the terms and conditions of its collective-bargaining agreements with the Union, i.e., by discontinuing its contributions to the health and welfare fund; changing health insurance carriers; ceasing the 24-hour workweek guarantee; ceasing the use of the Union's hiring hall; freezing payments for accrued vacation pay; and discontinuing the provision of vacation benefits; and by unilaterally changing the unit employees' payday from Thursday to Friday, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make the appropriate contributions to the health and welfare fund together with any liquidated damages required as a result of the obligations of the Respondent under the collective-bargaining agreement.[2] This shall include reimbursing employees for any contributions they themselves may have made, with interest, for the maintenance of health insurance coverage. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). We shall also order the Respondent to make whole unit employees, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any loss of wages and benefits suffered as a result of its unlawful repudiation of contractual provisions. We shall further order the Respondent to make the unit employees whole by paying the accrued vacation pay and providing vacation benefits. Interest on amounts owing to unit employees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Abernathy Excavating, Inc., Bladensburg,

[2] See *Merryweather Optical*, 240 NLRB 1213, 1216 fn. 7 (1979).

Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with International Union of Operating Engineers, Local No. 77, AFL–CIO as the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees, by failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union, by discontinuing its contributions to the health and welfare fund; by changing health insurance carriers; by ceasing the 24-hour workweek guarantee; by ceasing the use of the Union's hiring hall; by freezing payments for accrued vacation pay; and by discontinuing the provision of vacation benefits; and by unilaterally changing the unit employees' payday from Thursday to Friday.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give effect to the terms and conditions of employment of its collective-bargaining agreement with the Union.

(b) Make whole, in the manner set forth in the remedy section of this decision, unit employees for any losses resulting from the Respondent's failure to continue in effect the terms and conditions of its collective-bargaining agreement with the Union. The appropriate unit is:

> All operating engineers, mechanics and welders employed by the Respondent from its Bladensburg, Maryland facility; but excluding all other employees, shop laborers and clericals, office clericals, truck drivers, and guards and supervisors as defined in the Act.

(c) Post at its facility, copies of the attached notice marked ''Appendix.''[3] Copies of this notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with the International Union of Operating Engineers, Local No. 77, AFL–CIO as the exclusive bargaining representative of an appropriate unit of our employees, by failing to continue in effect all the terms of our collective-bargaining agreement with the Union, by discontinuing contributions to the health and welfare fund; by changing health insurance carriers; by ceasing the 24-hour workweek guarantee; by ceasing the use of the Union's hiring hall; by freezing payments for accrued vacation pay; and by discontinuing the provision of vacation benefits; and by unilaterally changing the unit employees' payday from Thursday to Friday.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give effect to the terms and conditions of employment of our collective-bargaining agreement with the Union.

WE WILL make whole unit employees for any losses resulting from our failure to continue in effect the terms and conditions of employment of our collective-bargaining agreement with the Union. The appropriate unit is:

> All operating engineers, mechanics and welders employed by us from our Bladensburg, Maryland facility; but excluding all other employees, shop laborers and clericals, office clericals, truck drivers, and guards and supervisors as defined in the Act.

ABERNATHY EXCAVATING, INC.